

**TOWN OF KITTERY
PLANNING BOARD MEETING**

Thursday, June 23, 2005

APPROVED
Council Chambers

Meeting called to order at: 6:20 p.m.

Present: Ron Ledgett, Chairman Russell White, Doug Muir, Janet Gagner, Scott Mangiafico, Ernest Evancic

Also Present: Mark Eyerman, Earledean Wells, Planner Jim Noel, Town Manager Jon Carter, Foreside Committee Chairman Ray Smith, Vice Chairman Balano

1. ROLL CALL

Roll call noted.

2. ORDINANCE DISCUSSION 6:15 - 8:30
Public Statements

Chairman White asks if there are issues from the folks here in case they don't want to stay for the whole workshop.

Judy Kehl: What's new for me is that, I have been interested in economic development for 25 years and the annual symposium was on Friday re: economic development. There were speakers there from Augusta and Washington. She does not know why none of the Town officials went to it. There is a lot of really good information that all of us are trying to consider. She went to look at the Main Street issue and found the condos. She thinks they did a great job designing this to fit into that neighborhood. She thinks that when the landscaping fills in, all the negative aesthetics will go away. We will have to deal with economic development when/if Navy Yard closes. Townhouses are much less likely to be purchased by families with children. Those without children tend to buy them. It costs \$11,000 per year to educate a child. How many townhouses would it take to support the single family house? Thirty. Should we be discouraging this kind of revenue coming in that does not impact the schools? The federal government funding that we have been receiving is being cut.

Chairman White attempts to cut her off.

Ms. Kehl continues. Money will be flowing into communities that meet 3 criteria. One of those is that they have reduced restrictions on housing development. We will not qualify for the reward money that used to come to communities in other ways. Economically, we can't bootstrap ourselves by restricting the one area.

Dick Barney, 4 Otus Avenue. He lives across from the green space on Otus that is now being developed. He spoke to the developer a week ago and was told to have no fear, it is a single unit coming in. Is there any way to find out? The 5,000 sf restriction will not apply to that space.

Chairman White says that right now, there is a moratorium on all but single families and duplexes.

Mr. Barney says that when the property was sold, he was waiting to see who bought it. A truck pulled up and he asked him what he was doing. He said it would be single family. There is a concern on the part of the residents of Foreside that congestion and overdevelopment should not be encouraged.

Susan Emery says that after the last session, she had a few thoughts. Sandy Domina made a comment about the fact that we have different aspects of the Foreside, residential and business. In the Comprehensive Plan, we look to revitalize the character. One thought she had is that perhaps the Planning Board and Town Council should look at having the lot size be different in different parts of the Foreside. Ray said maybe we should go back to the 20,000. If that would keep the residential part intact, then maybe we should do that. If something is working, then maybe we start there and then ask what we want to be different from the old zoning. Another idea had to do with preserving the buildings over a certain age, like they do in Charleston, SC. Maybe buildings over 100 years old should not be removed.

Chairman White asks if Mr. Eyerman had heard of that and he has.

Mr. Eyerman says that there are some buildings that you might want to tear down and then who decides?

Ms. Emery thinks that the design committee idea is great and that we should put as much clout into it as possible so that we are not opening the town up to lawsuits. We should figure out what we want and then design the zone to it.

Ms. Wells would like the Board to address tree retention and protection, as there are many stately trees there.

Robert Woods says the Shoreland Zone overlay is a zone, not a setback. The setback is 100' and in some cases 75'. The Foreside is a precious area. We have to seriously look at the options as we look at them today. The zoning in place currently has not been maximized as of yet. People could come in and correct it and preserve it. He hopes that the Board will look at it carefully before making any harsh, rash decisions.

Sarah Brown thinks the density is the biggest problem. As she spoke with people, they are really concerned about parking. It seems absolutely crazy to consider one and bump up to one and one-half. Look in our own homes and you will see that most families have two cars. It is a give away to developers to not require them to provide two spaces and make neighborhood absorb it. If we go down the road of splitting up the district, we have seen the spreadsheet that her husband did. Look at it very carefully. The only street that really has density is Government Street. 2,500 sf is not reflective of the density there. That is really the only street that could be broken off and allowed a higher density. If we are going to start breaking it off and look at it tonight...

Chairman White says there is no way that we can do that tonight or in time before the moratorium lifts. We will look at offering the neighborhood a better ordinance than it had before. We may farm it out to some citizens with a planning board delegate for a longer term study.

Sarah Brown also wants to make sure we are not scared by a right wing federal government.

Chairman White interrupts to say that there will be no political debates.

Ms. Kehl wants to make a correction. Trees could be in the way of parking and development. She thinks Government Street does accurately reflect the density.

Chairman White says that we are going back to workshop.

See also the Action Items 6-23-05.

3. PUBLIC COMMENT ON NON-AGENDA MATTERS (20 MINUTES)

Ms. Wells has a letter regarding a property owned by Ron Dalrymple. She wants to inform the Board regarding a possible wetland violation. KCC was notified of this on May 28, 2005, and immediately notified Town Manager Carter. Fill had been going on for quite some time and the resulting drainage problems were affecting the abutter. KCC has not received any information to date as to the wetland fill on this property.

Planner Noel says that ME DEP stopped by and Ms. Buford visited the site. It is a road or driveway that appears on the maps and it was determined that what was being done constituted repair and maintenance of that road.

Mr. Ledgett thinks it disturbed more than 1001 sf. If it did, it is supposed to come to us.

Planner Noel says maintenance and repair do not need a permit.

Mr. Ledgett says that disturbing wetland is not allowed. It might not violate DEP requirements, but ours are specific.

Mr. Mangiafico remembers there was an issue with that house in the past. It is the first house on Dion Ave. There was some filling done there and there may have been a violation in the past.

Planner Noel says it appears on the maps as a ROW, driveway or existing road. The determination was made that it was repair and maintenance.

Mr. Ledgett asks if there are any facts on what they are actually doing so that it is a reviewable decision. Mr. Ledgett would like to see the report.

Planner Noel is not sure that it is not part of the original subdivision. He has not been over there in a couple years.

Chairman White would say that we are in the position of not being the enforcement body. We do take an interest. Is it an existing road? Is it on the plan? If it is an improvement of an old woods road and that could have been on the plan, then he thinks this is an amendment to an approved plan. If it disturbs more than the 1000 feet, then it is a problem.

Planner Noel refers to page 281, permitted activities, f, where it states that the following uses are considered compatible and permitted within regulated wetlands: repair and maintenance of a road provided no wetland course is altered.

Ms. Wells says that the abutters' property is being affected.

Chairman White says that a woods road floods in season, and if you harden it up, then it is not a woods road anymore. If it is part of the subdivision, then it is part of our purview. Otherwise, it is not.

Mr. Ledgett says that there is language on page 281 above what has been read by Planner Noel that is also applicable. Normal maintenance is not supposed to expand the intrusion on the wetland. So, if this was a woods road and they went in and filled it and the wetland is more than 1000 sf, then that is the problem.

Chairman White says that we can say that this should be reviewed thoroughly and we would like to hear back on it.

Ms. Gagner agrees and would like to see that at the next meeting.

Chairman White would like to also. We will never have compliance with these rules if people

don't understand them.

4. PUBLIC HEARING: CIVIL CONSULTANTS FOR JAMES AND TUDOR AUSTIN, 6 LAWRENCE LANE, KITTERY, ME. APPLICANT IS PROPOSING TO RE-DIVIDE A LOT THAT WAS JOINED WITH AN ABUTTING LOT IN 2001. APPLICANT IS REQUESTING TO AMEND AN APPROVED SUBDIVISION. MAP 18, LOT 35, ZONED SUBURBAN RESIDENCE

Chairman White introduces the application. He asks if there is anything new. Tom Harmon, representing the applicant, says no.

Chairman White says we just saw you two weeks ago and you're back already. He asks if the Board has any issues.

Mr. Ledgett says that the issue in the beginning was that they were creating a nonconforming lot and they fixed that. He says that they were going to show that dock on the plan.

Mr. Harmon did not understand that he was to show the dock. He thought that was a nonissue.

Mr. Mangiafico says it is an existing structure.

Mr. Harmon says they have not been there this year.

Mr. Mangiafico says it was installed this year. Mr. Mangiafico thinks it should be added to the plan.

Mr. Ledgett says to show it is there.

Mr. Mangiafico and Mr. Ledgett discuss the setback required for the dock.

Chairman White says that it is not clear from the minutes that we wanted that on the plan.

Mr. Mangiafico would like it to be on the Mylar that Chairman White signs.

Mr. Harmon says that it is not a problem to put this on as a condition.

Dean Howells lives on Lawrence Lane on the east side, as does the rest of his family. He is opposing the subdivision. His family has been there for generations. The red barn has never been lived in. It is nonconforming. The only concern is to keep the population density down. He has to admit that this is a totally irrelevant consideration when it comes to the regulations, but it is the motivation. His family has lived on this road for 3 generations and all of a sudden to have a new family come in would be like having a new family in front of your view.

Mr. Ledgett asks if the nonconforming part is the setback of the barn.

Chairman White asks if the existing building is the home or the barn.

Chairman White says on lot 35b – it's the barn.

Mr. Ledgett says that was the gun shop.

Mr. Harmon has GIS photographs that show the area that he hands out.

Mr. Ledgett says, actually, they are both nonconforming.

Mr. Harmon says they are great because they point out where everything is. The photo shows the cottage and the one that are talking about. They were originally subdivided in 1980. They put the two lots together in 2001.

Mr. Ledgett says the cottage is slightly nonconforming. The porch is slightly in the 100 foot setback. If we are creating a lot with a nonconforming structure, what rules apply?

Planner Noel says that what is existing is what is existing. We are looking at lot size, not existing structures. That is not a consideration to be made.

Chairman White says the nonconformity of the structure exists and continues.

Mr. Ledgett says the nonconformance that we had to deal with is lot area and they have dealt with that.

Mr. Mangiafico says that at some point, there will be a change of use, but that is the CEO's purview. He does not think we are creating anything other than a conforming lot with a nonconforming building.

Chairman White says we are just filling in the lot lines. We would not be able to do anything to increase the nonconformity, but the applicant would not be required to remove the nonconformity.

Mr. Ledgett says the lot has the legal frontage for a dock, so we are not creating a nonconforming water dependent use.

Brad Lown represents Dean Howells. He appeared before the Board briefly in October. There has been an ongoing issue for many years about the structure on 35b that was a gun shop. They went before the ZBA and the Superior Court and the Supreme Court. Both courts ordered the Austins to discontinue the use of a gun shop and remove the guns. In October, they had reason to believe there were still guns. The violation continued even after multiple courts ordered that it be discontinued. He does not know if the town has had the chance to go into the barn on 35b to see if they are no longer in violation. He does not know what happened about that. The ordinance mandates that the application be denied if there is a violation and the burden is on the Austins to prove there is not. He did hear one on the Board comment on the size of the lot. Query as to whether the square footage was computed from the mean high water mark. The shape of the lot under the ordinance may be an issue. 16.32.940 indicates that the length should be no more than 3 times the width of the lot and it looks like that may be a problem under that section. Then there is the issue about whether there is a violation as a result of someone residing in the barn and whether that tenancy is a violation under the ordinance that would mandate that the application be denied. He understands that the town attorney has said that nonconformity is not an issue. The burden of proof is on the Austins. He would like to know whether there has been any investigation since October 2004 to establish that the violation is no longer there.

Chairman White has a letter from the CEO saying that she inspected building January 3, 2003, and found the business sufficiently closed and found no violations on the property. That letter is dated February 3, 2005.

Chairman White asks about the report of a tenancy.

Attorney Lown says that it is not recent. At one point, it was Mrs. Tudor Austin who said that she was living there.

Mr. Ledgett says that was last year.

Attorney Lown wants to know what the investigation consisted of. Did someone go inside? The Austins have used a number of ruses. They have put signs on the door saying it is closed, but the website was still running and guns were still inside. He would hope that both stories of the building were investigated.

Planner Noel has a letter from James O'Connell, CPA, a notice of surrender of firearms and a notice regarding the Federal Bureau of Firearms and Tobacco.

Chairman White does recall asking that there be proof of an investigation and that was done.

Mr. Ledgett asks for the code title for a spaghetti lot requirement.

Attorney Lown says 16.32.940.

Mr. Mangiafico asks for the total length.

Mr. Harmon says that he needs to scale it. He cannot use anything beyond elevation 6. That is the limiting factor.

Mr. Mangiafico sees 352 feet and 82 feet. That does not get to 350. It looks like it is not even 3 to 1.

Chairman White thinks the intent of this is within the ordinance itself. This is an odd shaped lot but it is not a flag lot.

Mr. Mangiafico does not think the barn being lived in is an issue. He thought at one point someone lived there.

Mr. Harmon says that they brought it before the Planning Board and ZBA with an apartment in there.

Mr. Mangiafico says that even if no one lived in there for a while, it still is an allowable use there.

Chairman White says that if there is an outstanding violation on the property, we are supposed to suspend the proceedings.

Mr. Mangiafico thinks that even if it was vacant for a time, it does not matter.

Mr. Ledgett says that the key question is whether it was ever granted an occupancy permit.

Chairman White thinks that we need to rely on the CEO.

Mr. Mangiafico says and she found that there were no violations on the property.

Mr. Ledgett thinks we need to be a little careful there. She went out and looked at the gun shop issue. He doesn't think it says anything about whether this was ever approved as a dwelling unit. To get an occupancy permit, you need to have septic or sewer. We do not know what this one does. If there is an apartment in there without an occupancy permit, that is a standing violation.

Chairman White says on the other hand, this is a letter from the CEO that says there are no violations.

Mr. Mangiafico asks if it would be appropriate to do a conditional approval that she go out there and look at these issues.

Mr. Muir would prefer that we defer action pending receipt of that evidence.

Chairman White thinks we have been through this once already. It is not our job to micromanage her job. We do not have evidence that someone is living there now.

Mr. Ledgett says we have a public record about people living there.

Planner Noel says he can go pull the property file. He goes to get it.

Attorney Lown says there is someone living there now.

Mr. Ledgett says that then there needs to be an occupancy permit.

Chairman White says that is correct if it is a dwelling unit. You can live in a shed if it is not a dwelling unit. It is the creation of a dwelling unit that would be the problem.

Mr. Ledgett does not think that is right.

Chairman White says the issue is whether there is a dwelling unit that has been created there without an occupancy permit because a dwelling unit has to have eating, sleeping, and bathroom facilities.

Mr. Ledgett says that you are not supposed to live in a structure that does not have an occupancy permit.

Mr. Mangiafico says that if there has always been an apartment in that thing, it may predate any

occupancy permit. As long as with the business they did not remove the necessities of a dwelling unit, they would not lose it. It would be different if it were not an allowed use in that zone. Would the fact that there would potentially be guns be a zoning violation or a court order violation?

Chairman White thinks that issue is resolved by that letter unless someone knows that after January 3, there were guns there.

Mr. Ledgett says that it would not be a land use violation.

Chairman White is looking at the definition of a dwelling unit.

Mr. Ledgett says the question is whether there is an occupancy permit.

Mr. Mangiafico thinks that there is sufficient evidence that there is no longer a business there and that the guns have been removed.

Mr. Ledgett is a little concerned about the dwelling unit. If there is a violation, we are not supposed to deal with this.

Mr. Harmon asks if the town has to determine there is a violation.

Chairman White says that if it is a reliable, reasonable statement that we should look into, then we set that process in motion.

Mr. Ledgett says the analogy used by Attorney McEachern was that if you run a stop sign, you're in violation. You may get away with it, but there was still a violation. If you have a reasonable concern....

Chairman White says no one has brought forward that there is a violation, that if there is a dwelling unit there, it is not a legal occupancy. Why hasn't that complaint been made before tonight?

Attorney Lown says that in October, they knew that there was a violation. They did not need the additional basis. Now they know that someone is living there. He has not done the research to see if there was a certificate of occupancy. When the applicant came before the ZBA, that was to get a special exception as to the occupancy.

Chairman White says that we may need to table this and have the Planner report back to us.

Mr. Muir asks if there is something else we could do while waiting for the Planner.

Chairman White says we can wait to see if the Planner can find anything tonight.

Planner Noel returns and says the file is massive.

Chairman White asks if Attorney Lown knows of any other potential violations on the property.

Attorney Lown says that is the only one of which he knows.

Chairman White says that he will solicit a motion to continue or table the matter so that this information can be generated so that we know what is going on.

Mr. Mangiafico would like to conditionally approve it and, if there is a violation, we can stop it. We don't know that a violation exists. He reads from the code as to when the approval must be denied.

Mr. Ledgett has a problem with that. His understanding is that the Boards are not supposed to consider an application if there is any reasonable possibility that there is a violation.

Ms. Gagner asks if it has to be noticed to the applicant.

Mr. Ledgett says that if it is a reasonable concern, then it has to be investigated. Who is most likely to know what is going on in that place? The neighbor. The question is does it have an occupancy permit?

Chairman White adds and does it need one?

Mr. Mangiafico asks if it was always a barn.

Planner Noel says that initially, when the approval for the gun shop was approved, it was approved as a home occupation. Therefore, it was approved as a home occupation. It still brings you back to whether it was initially given a certificate of occupancy.

Mr. Ledgett says that answers the question. The approval was not issued as a commercial business. It was issued as a home occupation. We need to verify that and that is sufficient grounds. Mr. Ledgett asks if he saw that.

Planner Noel saw it.

Attorney Lown says it was reversed by the Superior Court.

Planner Noel says that it was with respect to the gun shop, not the home.

Attorney Lown would disagree. It was never raised whether that was an appropriate and approved dwelling unit.

Planner Noel says that it was a given that the dwelling was an approved, permitted use, and in conjunction with that, they were looking at having a business in there.

Attorney Lown says that it was not a given, not addressed and not ruled upon.

Chairman White says that we could rely on the findings of the ZBA if we wish to.

Mr. Ledgett says except if they were overruled by two courts, including the Law Court. He would be a little uneasy with this thing, especially with the assertion of a potential violation. Why should we be putting the Planning Board in this position?

Chairman White asks to continue this matter for 30 days.

Mr. Harmon is sure the Austins will not be happy about continuing this.

Chairman White asks if the Austins will agree to continue this.

Mr. Harmon's opinion is that there is not a violation here.

Mr. Muir asks if the applicant is willing to gamble that we will not approve this application or would he like the comfort of another hearing?

Mr. Harmon would go with the Board's pleasure.

Mr. Mangiafico moves to continue the public hearing with respect to the application submitted by Civil Consultants for James and Tudor Austin, 6 Lawrence Lane, Kittery, Map 18, Lot 35, zoned suburban residence, until the next available public hearing, date to be scheduled by the Town Planner.

Mr. Ledgett seconds.

All in favor.

Mr. Harmon will go back to the Austins and see if they can find the back up paperwork for this.

Mr. Ledgett says if there is a legitimate occupancy permit on this, he doesn't think there is much more we need to do on this.

Mr. Muir feels this is a substantial point and we cannot do this as a conditional approval.

Mr. Ledgett says Mr. Muir has a very good point here. We need to see the evidence. He says that's Attorney McEachern's position. If there is any doubt, you have to go get the facts. You shouldn't do conditional approvals on something that could go the other way.

Mr. Mangiafico says there has been someone living there forever.

Planner Noel says the question remains whether it is permitted.

Mr. Mangiafico says that they will just go get approval if they don't have it.

Chairman White tends to think it is a nonissue but he would like it documented.

5. OLD BUSINESS / MEETING MINUTES

The Board will work on meeting minutes next week.

6. PLANNER'S TIME

Planner Noel e-mailed to the Board the revisions on the technical review. There are two of them. There is a public hearing with the Town Council on Monday. The Council was unaware the workshop was tonight. We are first on the agenda. Chairman White, Ms. Gagner, Mr. Ledgett and Mr. Muir will be there.

Mr. Mangiafico just gave the Planner an advertisement by Shepard's Cove that says that 20% of their housing is not restricted. Mr. Mangiafico thought that it was all elderly.

Mr. Mangiafico pulled a file to see about 30% expansion with respect to the big individual house by Badgers Island Marina.

Planner Noel says it is in the exact place it was.

Mr. Mangiafico says that 1/3 of it was in the 75' setback. The approval was for a 30% expansion in there. He thinks that they went bigger than that. It is four stories along the waterfront plus decks.

Mr. Ledgett says to tear it down.

Mr. Mangiafico says to get public access.

Chairman White says we will have a quorum for the Council meeting

7. ADJOURNMENT

Ms. Gagner moves to adjourn at 9:59

Mr. Mangiafico seconds.

All in favor.